Supreme Court, U.S.
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No. 00-733

In the

Supreme Court of the United States

RICHARD NICHOLAS, et al.,

Petitioners,

v.

SAUL STONE & COMPANY, LLC, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT NATIONAL FUTURES ASSOCIATION

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QUESTIONS PRESENTED

1. Should the federal courts create an implied private right of action under the Commodities Exchange Act ("CEA") against NFA Members for damages resulting from violations of NFA Bylaw 1101 despite the fact that no such action is contained in the exclusive remedies available to investors that were expressly created by Congress?

2. CEA § 22(b)(2) provides plaintiffs with an express cause of action against the NFA for failing to enforce any bylaw that is "required" by CEA § 17. NFA Bylaw 1101 was promulgated under § 17(m), which provides that the CFTC "may" approve certain membership rules of futures associations. Did the district court and the Third Circuit correctly determine that Bylaw 1101 was not "required" by § 17(m), and that the NFA therefore cannot be liable under § 22(b)(2) for allegedly failing to enforce that bylaw?

RULE 29.6 STATEMENT

Respondent National Futures Association is a not-for-profit corporation that operates as a registered futures association under 7 U.S.C. § 17. It has no parent corporation and no capital stock. Therefore, no publicly-held company owns 10% or more of the NFA's stock.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

The History Of NFA Bylaw 1101 1

The Express Right Of Action In § 22 Of The Commodities Exchange Act 3

The Decisions Of The District Court And Third Circuit 5

REASONS FOR DENYING THE PETITION 6

I. THE ONLY ARGUMENT DIRECTED AGAINST THE NFA THAT PROPERLY HAS BEEN PRESENTED TO THIS COURT IS WHETHER NFA BYLAW 1101 CAN FORM THE BASIS FOR A PRIVATE ACTION UNDER CEA § 22(b)(2) 8

II. THE COURT SHOULD DENY REVIEW OF PETITIONERS' CLAIM THAT THE NFA CAN BE HELD LIABLE UNDER CEA § 22(b)(2) FOR NOT ENFORCING BYLAW 1101 10

A. No Conflict Exists Between The Decision Of The Third Circuit In This Case And Any Other Court Regarding Petitioners' Sole Claim Against The NFA 10

B. The Third Circuit's Decision Is Fully Consonant With Prior Decisions Of This Court And The Plain Language And Legislative History Of The CEA 11

III. THE COURT SHOULD DECLINE PETITIONERS' INVITATION TO DECIDE WHETHER NFA BYLAW 1101 PROVIDES AN IMPLIED PRIVATE RIGHT OF ACTION AGAINST THE NFA'S MEMBERS 16

A. No Conflict Exists For This Court To Resolve 16

B. The NFA Has Never Endorsed Or Condoned A Private Right Of Action To Enforce Bylaw 1101 18

C. This Court Should Not Entertain Petitioners' Request For A New Implied Private Right Of Action 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases	PAGE(S)
Acampora v. Prudential Bache Securities, Inc., [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,792 (C.F.T.C. Aug. 31, 1987)	17
American Agriculture Movement, Inc. v. Board of Trade, 977 F.2d 1147 (7th Cir. 1992)	21
Board of Trade v. Securities & Exchange Commission, 883 F.2d 525 (7th Cir. 1989)	9, 10
Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 410 F.2d 135 (7th Cir. 1969)	19, 21-22
Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164 (1994)	20
Colonial Realty Corp. v. Bache & Co., 358 F.2d 178 (2d Cir. 1966)	21
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)	13
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992)	20
Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)	20
Harvey v. Board of Chosen Freeholders, 153 A.2d 10 (N.J. 1959)	15

Heckler v. Chaney, 470 U.S. 821 (1985) 9, 18-19

Idahoan Fresh v. Advantage Produce, Inc.,
157 F.3d 197 (3d Cir. 1998) 13

Indemnified Capital Investments, S.A.
v. R.J. O'Brien & Associates, Inc.,
12 F.3d 1406 (7th Cir. 1993) 22

Izumi Seimitsu Kogyo Kabushiki Kaisha v.
U.S. Philips Corp., 510 U.S. 27 (1993) 9

In re Lake States Commodities, Inc.,
936 F. Supp. 1461 (N.D. Ill. 1996) 16

Lang v. French, 974 F. Supp. 567
(E.D. La. 1997) 10

Merrill Lynch, Pierce, Fenner & Smith,
Inc. v. Curran, 456 U.S. 353 (1982) 3, 4, 19

Musick, Peeler & Garrett v. Employers
Insurance, 508 U.S. 286 (1993) 20

Nelson v. Adams USA, Inc., 529 U.S. 460,
120 S. Ct. 1579 (2000) 8-9

Peltz v. SHB Commodities, Inc., 115 F.3d
1082 (2d Cir. 1997) 16, 17

Porter v. Shearson Lehman Brothers, Inc.,
802 F. Supp. 41 (S.D. Tex. 1992) 21

Shultz v. Securities & Exchange Commission, 614 F.2d 561 (7th Cir. 1980) 10

Smith v. United States, 508 U.S. 223 (1993) 13

Spicer v. Chicago Board of Options Exchange, Inc., 977 F.2d 255 (7th Cir. 1992) 22

Thompson v. Thompson, 484 U.S. 174 (1988) 20

Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) 20, 21

Statutes and Rules

7 U.S.C. § 18 (CEA § 14) 17

7 U.S.C. § 21 (CEA § 17) ..... *passim*

7 U.S.C. § 25 (CEA § 22) ..... *passim*

5 U.S.C. § 551 9-10

SUP. CT. R. 10 ..... 6, 7, 11, 12

SUP. CT. R. 14 9

NFA Bylaw 1101 2-3

Other Authority

124 Cong. Rec. H7206 (daily ed. July 24, 1978) ... 2, 14

STATEMENT OF THE CASE

The History Of NFA Bylaw 1101

The National Futures Association ("NFA") is a private, not-for-profit membership corporation that operates as the futures industry's self-regulatory organization. (Pet. App. 38a.) The NFA has no capital stock, and no part of the NFA's net revenues or earnings may inure to the benefit of any Member. The NFA's revenues, therefore, consist almost entirely of membership dues and fees routinely assessed on its Members. (NFA 3d Cir. Br. at 6-7.)

On September 22, 1981, the Commodities Futures Trading Commission ("the CFTC") formally designated the NFA a "registered futures association" under Section 17 of the Commodity Exchange Act ("CEA"). (Pet. App. 120a.) This was not the NFA's first attempt to achieve that certification, however. The NFA previously had submitted a draft application in 1977, which included a mandatory membership requirement. (*Id.* at 95a.) The Justice Department expressed concern that this membership requirement was not "the least anticompetitive means available to the Commission to achieve the objectives of the Act," and that it therefore was unconstitutional and inconsistent with antitrust law. (*Id.* at 95a, 110a.) As a result, the CFTC placed the NFA's application on hold. (*Id.* at 96a.)

In 1978, Congress explicitly addressed the concerns raised by the Justice Department by amending the CEA to include a new § 17(m), which reads as follows:

> Notwithstanding any other provision of law, the Commission *may* approve rules of futures asso-

> ciations that, directly or indirectly, require persons eligible for membership in such associations to become members of at least one such association, upon a determination by the Commission that such rules are necessary or appropriate to achieve the purposes and objective of this chapter.

7 U.S.C. § 21(m) (emphasis added); (Pet. App. 173a); (*see also* Pet. App. 110a-113a.) In his remarks to Congress, Representative Foley clarified that this new section did not *require* a mandatory membership rule as a condition of certification as a registered futures association, but gave the CFTC the discretion to approve such a rule: "Use of the authority of this amendment would be completely discretionary with the Commission." 124 Cong. Rec. H7206 (daily ed. July 24, 1978); (Pet. App. 112a-113a.) This discretionary aspect of the rule was consistent with the Justice Department's warnings that requiring a mandatory membership rule would be unconstitutional and would violate antitrust laws.

After this Congressional amendment, the NFA submitted its official application to the CFTC for registration as a registered futures association on March 16, 1981. (Pet. App. 92a.) This application included NFA Bylaw 1101, which indirectly mandated NFA membership by futures industry professionals by prohibiting any NFA Member from doing business with non-Members. Bylaw 1101 states that:

> No Member may carry an account, accept an order or handle a transaction, in commodity futures contracts, for or on behalf of any non-Member of NFA, or suspended Member, that is

> required to be registered with the Commission [CFTC] as an FCM [Futures Contract Merchant], Introducing Broker, Commodity Pool Operator, Commodity Trading Advisor, or Leverage Transaction Merchant, and that is acting in respect to the account, order or transaction for a customer, a commodity pool or participant therein, a client of a commodity trading advisor, or any other person . . . . No Member may accept orders in commodity futures contracts to cover leverage transactions, for or on behalf of any non-Member of NFA, or suspended Member, that is required to be registered with the Commission as a Leverage Transaction Merchant . . . .

(Pet. App. 145a.)

In an order September 22, 1981, the CFTC granted the NFA's application. The CFTC relied on Congress' passage of CEA § 17(m) to conclude that, "there is no longer any question that the Commission *may*, in registering a futures association, entertain and approve a proposal that would, in effect, mandate membership in the association." (Pet. App. 113a (emphasis added).)

The Express Right Of Action In § 22 Of The Commodities Exchange Act

In 1982, this Court found an implied private right of action for violations of the anti-fraud provisions of the CEA. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 388 (1982). In reaching this result, the Court looked at the legal landscape at the time that the 1974 amendments to the CEA were enacted, and

determined that, in amending the CEA, Congress had not intended to change the preexisting remedy of private lawsuits against Futures Contract Merchants ("FCMs") and futures exchanges. *Id.* at 387-88. Congress responded to the *Curran* decision by again amending the CEA. In 1982, Congress enacted § 22, which provided an express cause of action in certain limited circumstances against FCMs, exchanges and registered futures associations. 7 U.S.C. § 25. Congress also made clear that the express causes of action in § 22 were the "exclusive" remedies provided by the CEA. 7 U.S.C. §§ 25(a)(2) & (b)(5).

Under Section 22(b)(2), a registered futures association can be sued only in the narrow circumstance where it fails to enforce a bylaw or rule that is *required* by § 17 of the Act:

> A registered futures association that fails to enforce any bylaw or rule that is *required* under section 21 [CEA § 17] of this title . . . shall be liable for actual damages sustained by a person that engaged in any transaction specified in subsection (a) of this section to the extent of such person's actual losses that resulted from such transaction and were caused by such failure to enforce . . . such bylaw or rule.

7 U.S.C. § 25(b)(2) (emphasis added); (Pet. App. 179a.) Section 22(b)(4) provides that the association can only be liable if it "acted in bad faith in failing to take action." 7 U.S.C. § 25(b)(4); (Pet. App. 180a.)

Section 22(b)(5) provides that the right of action authorized by § 22(b)(2) is the "exclusive remedy" available to

any person who sustains such a loss. 7 U.S.C. § 25(b)(5); (Pet. App. 180a.). The limited remedies set forth in CEA § 22 thus wholly replaced the implied private rights of action that this Court previously recognized in *Curran*.

The Decisions Of The District Court And Third Circuit

Petitioners asserted in the district court that the NFA should be held liable under CEA § 22(b)(2) for not strictly enforcing NFA Bylaw 1101. The district court dismissed Petitioners' claim on the basis that Bylaw 1101 was not a "required" rule under CEA § 22(b)(2). (Pet. App. 68a-69a.) The district court followed the plain language of § 22(b)(2) that the NFA "must fail to enforce a bylaw, rule or regulation that is required to be enforced by Section 17 of the CEA" before it can be held liable. (*Id.* at 68a.) The court then found that "the plain meaning of the word 'may' in Section 17(m)" did not require adoption of Bylaw 1101, but only permitted it. (*Id.* at 69a.) After reviewing the plain language of the exclusive remedy contained in the CEA, the district court also determined, based on the only other district court decision on point, that no other private right of action could be judicially implied for violations of NFA Bylaw 1101. (*Id.* at 69a-70a.)

On appeal, the Third Circuit expressly adopted the conclusions reached by the district court, and found the district court's disposition of the issues against the NFA to be "cogent and persuasive." (Pet. App. 30a.)

REASONS FOR DENYING THE PETITION

The *certiorari* petition raises two issues, both of which revolve around NFA Bylaw 1101. The first issue is whether federal courts should create an implied right of action against NFA Members for violations of Bylaw 1101. The second is whether NFA Bylaw 1101 is "required" by § 17 of the Commodities Exchange Act so as to allow an express cause of action against the NFA under CEA § 22(b)(2) for an alleged bad faith failure to enforce the bylaw. Although only the second of these issues directly implicates a claim against the NFA itself, as opposed to its Members, for the sake of clarity and completeness, the NFA addresses both issues in this opposition brief.

This case fits none of this Court's criteria for the granting of *certiorari*. *See* SUP. CT. R. 10. As to the first issue—whether an implied private right of action exists for violations of Bylaw 1101—Petitioners have invented a conflict with the Second Circuit by citing a case that neither mentions Bylaw 1101 nor involves any implied private right of action at all. The only cases on point are those of the district court and court of appeals below and one case from the Northern District of Illinois, all of which are in agreement that no implied right of action exists for violations of Bylaw 1101. As to the second issue—the one brought against the NFA directly—the district court and court of appeals below are the only courts ever to have addressed this point. Petitioners do not attempt to argue otherwise. There is thus no "conflict with the decision of another United States court of appeals on the same important matter," or "with a de-

cision by a state court of last resort," or "with relevant decisions of this Court." *Id.*

Petitioners also can make no persuasive claim that the issues decided by the district court and Third Circuit in this case are ones that necessarily should be "settled by this Court." SUP. CT. R. 10(c). Because the statute under which Petitioners are proceeding already contains exclusive remedies that Petitioners have failed to meet, 7 U.S.C. § 25(b)(5); (Pet. App. 180a), this case is a particularly good example of why recent attempts to imply private rights of action inevitably have met with failure.

The second issue likewise was decided under well-settled principles of statutory construction. Section 22(b)(2) of the Commodities Exchange Act allows private causes of action against the NFA only where the NFA fails to enforce a bylaw or rule that is *required* by § 17 of the CEA. NFA Bylaw 1101 was promulgated under CEA § 17(m), which provides that the CFTC *may* approve the passage of such a bylaw. Both the plain language and legislative history of § 17(m) demonstrate conclusively that the word "may" was meant to make the passage of a mandatory membership rule discretionary and not a condition of approval as a registered futures association. The district court and court of appeals thus correctly found that § 17(m) did not "require" the passage of Bylaw 1101, and could not form the basis for a cause of action under CEA § 22(b)(2).

I. THE ONLY ARGUMENT DIRECTED AGAINST THE NFA THAT PROPERLY HAS BEEN PRESENTED TO THIS COURT IS WHETHER NFA BYLAW 1101 CAN FORM THE BASIS FOR A PRIVATE ACTION UNDER CEA § 22(b)(2).

The *certiorari* petition presents two questions to this Court. (Pet. at i.) Only the second of these questions involves a claim directed toward the NFA.

The first question asks only whether a private cause of action exists against *NFA Members*, not against the NFA itself: "Do investors in commodities futures contracts have a private cause of action against *NFA Members* for damages resulting from violations of NFA Bylaw 1101." (Pet. at i (emphasis added).)

In addition to the plain language of Petitioners' *certiorari* petition, Petitioners have expressly waived any such claim against the NFA. In its Reply Brief to the Third Circuit, Petitioners stated, "The NFA leads the Court to believe . . . that the Plaintiff's claim is essentially a private right of action outside of 7 U.S.C. § 25(b) [CEA § 22(b)]. This is simply not so." (Pet'r 3d Cir. Reply Br. at 15.) Immediately following this sentence is footnote 5, which provides, "Private right of action is being pursued as to the FCM Defendants." (*Id.* at 15 n.5.) Petitioners therefore have clarified that they are not seeking to impose an implied private right of action against the NFA itself. Indeed, nowhere in Petitioners' briefs below did they even attempt to make such an argument against the NFA; it is therefore waived. *See Nelson v. Adams USA, Inc.*, 529 U.S. 460, 120 S. Ct. 1579, 1586 (2000) ("It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential

grounds of decision in higher courts."). In sum, neither the first question presented nor Argument I in the *certiorari* petition, (Pet. at i, 11-22), involves claims directed at the NFA.[1]

Petitioners' Argument III, which raises issues under the Administrative Procedure Act, is entirely barred from this Court's review. (Pet. at 25-28.) Neither of the two questions presented by the petition reference the Administrative Procedure Act. Petitioners therefore have failed to comply with this Court's Rule 14.1(a). Merely discussing the issue in the text of the petition is not sufficient to bring it before the Court. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993). Petitioners also never once raised this argument in the lower courts; thus, it is waived here. *Nelson*, 120 S. Ct. at 1586.[2]

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[1] Despite this issue not being raised against the NFA, the NFA nonetheless believes that this is not a question that should be considered by this Court on *certiorari* review. (*See* Section III *infra*.) Indeed, Petitioners thought so little of this argument that their lower court briefs barely mentioned it and the district court addressed it only in passing. (Pet. App. 69a-70a.)

[2] Argument III is a futile attempt to distinguish the solid body of case law from this Court and the federal circuits holding that an agency's decision not to enforce its own rules is presumed to be judicially unreviewable. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 830-32 (1985); *Bd. of Trade v. Sec. & Exch. Comm'n*, 883 F.2d 525, 530 (7th Cir. 1989). Furthermore, the NFA, as a self-regulatory body, is not a federal agency subject to the APA. *See* 5 U.S.C. § 551(1) (defining an "agency" as an "authority of the Government of the United

(continued...)

The only remaining claim against the NFA in the petition is the second question presented and the accompanying Argument II, namely, whether NFA Bylaw 1101 is "required" by CEA § 17 so as to allow a private right of action against the NFA under § 22(b)(2) if it, in bad faith, fails to enforce this bylaw. (Pet. at i, 22-25.) It is to this issue that we now turn.

II. THE COURT SHOULD DENY REVIEW OF PETITIONERS' CLAIM THAT THE NFA CAN BE HELD LIABLE UNDER CEA § 22(b)(2) FOR NOT ENFORCING BYLAW 1101.

A. No Conflict Exists Between The Decision Of The Third Circuit In This Case And Any Other Court Regarding Petitioners' Sole Claim Against The NFA.

The only courts ever to have ruled on the second issue presented to this Court—whether NFA Bylaw 1101 is required by CEA § 17 so as to trigger a private right of

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(...continued)
States"); *Shultz v. Sec. & Exch. Comm'n*, 614 F.2d 561, 569 (7th Cir. 1980) (Chicago Board Options Exchange was not an "authority of the Government of the United States" and thus was not subject to the APA); *Lang v. French*, 974 F. Supp. 567, 569 (E.D. La. 1997) ("SROs [self-regulatory organizations] are private organizations that operate subject to a scheme of government regulation. They generally are not subject to the requirement applicable to a government agency.") (citations omitted). Nevertheless, the rationale of these APA cases—that judges should not decide where an agency places its resources and priorities, *Board of Trade*, 883 F.2d at 531—applies by analogy to the NFA's role as a self-regulatory body.

action under § 22(b)—are the district court and court of appeals in this case. No other federal circuit court, federal district court or state court at any level has addressed this issue.

This case therefore fails to meet any of the criteria set forth in Supreme Court Rules 10(a) or 10(b) for granting a petition for a writ of *certiorari*. No "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10(a). The Third Circuit has not "decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Id.* Nor has the Third Circuit's decision "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *Id.* Finally, no "state court of last resort has decided an important federal question" in this case. SUP. CT. R. 10(b). Indeed, no state court was involved here at all.

The only remaining basis for granting review on this issue can be found in Supreme Court Rule 10(c). That rule is addressed in the next section.

B. The Third Circuit's Decision Is Fully Consonant With Prior Decisions Of This Court And The Plain Language And Legislative History Of The CEA.

Supreme Court Rule 10(c) allows a discretionary grant of *certiorari* in those compelling circumstances where "a United States court of appeals has decided an important

question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). The Third Circuit's adoption of the district court's holding here not only fails to conflict with any past decision of this Court, it is amply supported by the plain language and legislative history of the CEA and NFA Bylaw 1101.

Petitioners admit that, "In order for the NFA to be held liable pursuant to 7 U.S.C. § 25(b)(2) [CEA § 22(b)(2)] . . . it must have failed to enforce a bylaw or rule *required* by 7 U.S.C. § 21 [CEA § 17]." (Pet. at 22 (emphasis added).) NFA Bylaw 1101, which prohibits transactions with non-Members, is not a bylaw *required* by Section 17 of the CEA. The NFA adopted this bylaw pursuant to CEA § 17(m), which provides that, "the Commission *may* approve rules of futures associations that, directly or indirectly, require persons eligible for membership in such associations to become members of at least one such association . . . ." 7 U.S.C. § 21(m) (emphasis added); (Pet. App. 173a.).[3]

The district court and court of appeals correctly determined that the plain meaning of the word "may" in § 17(m) *permits* the NFA to adopt rules such as Bylaw 1101, but does not *require* the NFA to do so as a condi-

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[3] Petitioners also make passing reference to CEA § 17(b)(8) [7 U.S.C. § 21(b)(8)], which requires that the rules of the association provide for appropriate discipline of its members. (Pet. App. 160a.) That section is irrelevant, however, because NFA Bylaw 1101 was passed under CEA § 17(m), not § 17(b)(8). (Pet. App. 109a-115a.)

tion to becoming a registered futures association. "The word 'may' clearly connotes discretion." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). Where, as in this case, the "ordinary and natural meaning" of Congressional language is absolutely unambiguous, that language cannot be disregarded. *Smith v. United States*, 508 U.S. 223, 228 (1993).

To avoid this result, Petitioners are relegated to arguing that, "As used in 7 U.S.C. § 21(m) [CEA § 17(m)] . . . MAY means SHALL and is mandatory." (Pet. at 23 (emphasis in original).) While a court may depart from the plain language of a statute by an extraordinary showing of contrary congressional intent, *Idahoan Fresh v. Advantage Produce, Inc.*, 157 F.3d 197, 202 (3d Cir. 1998), the legislative history of § 17(m) clearly demonstrates that Congress meant what it said here.

Congress amended the CEA in 1978 to include Section 17(m), partially in response to the Justice Department's concerns that the NFA's proposed Bylaw 1101 was *prohibited* by the Fifth Amendment and antitrust law. (Pet. App. 110a.) In keeping with the Department of Justice warnings, Congress drafted Section 17(m) in such a way as to affirmatively reject any requirement that a registered futures association mandate membership as a condition to its registration. (*Id.* at 112a.) To the contrary, "Congress expressly authorized the Commission, *in its discretion*, to approve requirements that directly or indirectly mandate membership in futures associations . . . ." (*Id.* (emphasis added).) So as to remove any doubt about Congress' intentions, Representative Foley, when introducing § 17(m), made clear that this new section contains no mandatory membership requirement:

> [Section 17(m)] provides expressly that the Commission *may* approve rules for any futures association or associations that would require persons eligible for membership to become members of at least one such association . . . . Use of the authority of this amendment would be *completely discretionary* with the Commission.

(Pet. App. 112a-113a (emphasis added)); 124 Cong. Rec. H7206 (daily ed. July 24, 1978). The CFTC exercised that discretion in 1981 when it approved the NFA's application to become a registered futures association. (Pet. App. 109a-115a, 120a.) Both the plain meaning and legislative history of § 17(m) thus demonstrate that it is not a "required" rule for purposes of § 22(b)(2).[4]

Petitioner's argument that § 17(m) makes NFA Bylaw 1101 a "required" rule simply because it is in the "public interest" is specious. Petitioners cite only to a case from the New Jersey Supreme Court, which notes that, "the word 'may' must be given 'a mandatory significance where it is employed in a statute to delegate a power, the exercise of which is important for the protection of public interests *and where, it can clearly be taken from the nature and object of the statute, a mandatory significance*

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[4] At various times in their Petition, Petitioners appear to confuse the mandatory nature of Bylaw 1101 itself (which requires membership in the NFA to transact business) with the question of whether such a bylaw is required by CEA § 17 as a condition to being approved as a registered futures association. Under CEA § 22(b)(2), however, the only relevant question is whether the bylaw is "required under section 21 of this title [CEA § 17]," *not* whether the bylaw itself imposes mandatory requirements upon NFA Members.

was intended.'" Harvey v. Bd. of Chosen Freeholders, 153 A.2d 10, 16 (N.J. 1959) (citation omitted, emphasis added). At issue in *Harvey* was a New Jersey statute that provided, "The board of chosen freeholders . . . May retire any court attendant in the office of sheriff" upon reaching 65 years of age. *Id.* at 13. The court determined that the legislature meant for the statute to be mandatory, relying mainly on the "statement of purpose" attached to the statute, which clearly provided: "This bill will *Require* pensionable court attendants . . . to retire at 65 . . . ." *Id.* at 16-17 (emphasis added). Of course, no similar statement of purpose can be found in § 17(m). On the contrary, the clear legislative purpose of § 17(m) was to render the passage of membership requirements like Bylaw 1101 discretionary in order to avoid constitutional and antitrust problems. (Pet. App. 110a-113a.)

In sum, the legislative intent, history, structure and plain language of § 17(m) demonstrate that, although rules such as Bylaw 1101 *may* be adopted by a registered futures association, they are not "required" by § 17. Because Petitioners' claim under § 22(b)(2) was based on the NFA's alleged failure to enforce NFA Bylaw 1101—a rule not required by CEA § 17—it properly was dismissed. The ruling below was consonant with well-settled principles of statutory construction and does not conflict with any past decisions of this Court or of any other court. It is therefore simply not worthy of *certiorari* review.

III. THE COURT SHOULD DECLINE PETITIONERS' INVITATION TO DECIDE WHETHER NFA BYLAW 1101 PROVIDES AN IMPLIED PRIVATE RIGHT OF ACTION AGAINST THE NFA'S MEMBERS.

While not a model of clarity, Petitioners' brief also raises the issue of whether they may bring an implied private right of action against the NFA's *Members* outside of the express right of action found in CEA § 22. 7 U.S.C. § 25. While this claim is not being raised against the NFA itself, (*see* Section I *supra*), the NFA nevertheless believes that a brief response to this argument would assist the Court to dispose of Petitioners' entire *certiorari* petition.

A. No Conflict Exists For This Court To Resolve.

Like the other question presented by Petitioners, this one also involves no conflicts between different United States courts of appeals, a state supreme court or prior decisions of this Court. SUP. CT. R. 10. The only courts to have ruled on the precise issue presented here—whether plaintiffs have an implied private right of action to enforce NFA Bylaw 1101—are the district court and court of appeals below and one district court in the Northern District of Illinois. *See In re Lake States Commodities, Inc.*, 936 F. Supp. 1461, 1469 (N.D. Ill. 1996). All three courts reached the same result: there is no implied private right of action.

Petitioners try to manufacture a conflict by citing to the Second Circuit's holding in *Peltz v. SHB Commodities, Inc.*, 115 F.3d 1082 (2d Cir. 1997). *Peltz* did not involve any implied private right of action. It also did not

involve NFA Bylaw 1101. Instead, the plaintiff there sued the defendant FCM under a variety of theories, including willful deceit under CEA § 4b, willful inducement to violate CEA regulations, and state law claims for breach of fiduciary duty, breach of contract and fraud. 115 F.3d at 1086. The Second Circuit interpreted 17 C.F.R. § 166.2 as requiring an FCM to conduct a reasonable inquiry into a designee's authority before making a trade in cases of apparent agency, but not in cases of actual agency. *Id.* at 1089. Because the FCM in that case had actual authority from the designee, the Second Circuit upheld the district court's ruling that the FCM was not liable. *Id. Peltz* cannot create a conflict with the Third Circuit because it dealt entirely with express rights of action authorized by 7 U.S.C. § 25(a)(1).

Petitioners' citation to a 13-year-old ruling in a reparations case before an administrative law judge also fails to create any conflict here. *Acampora v. Prudential Bache Securities, Inc.*, [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 23,792 (C.F.T.C. Aug. 31, 1987), was a claim brought by a customer against its FCM under CEA § 14. 7 U.S.C. § 18. The administrative law judge noted in *dicta* that the defendant FCM's failure to register one of its brokers with the CFTC was a violation of the Commodities Exchange Act and "may render them liable for any damages resulting from trading activities during the time they are not registered." *Acampora*, [1986-87 Transfer Binder] Comm. Fut. L. Rep. (CCH) at 34,091. Again, the decision did not involve an implied private right of action under NFA Bylaw 1101. The ALJ clearly was referring to the express damages allowed under CEA § 14, 7 U.S.C. § 18(a), in reparation proceedings brought

before the CFTC. This holding therefore does not conflict with the decisions of the district court and court of appeals below, which held that no implied private right of action exists in the courts to enforce violations of NFA Bylaw 1101.

B. The NFA Has Never Endorsed Or Condoned A Private Right Of Action To Enforce Bylaw 1101.

The NFA feels obliged to correct certain misstatements that Petitioners have made about the enforcement of Bylaw 1101. Contrary to Petitioners' contention, the NFA never has admitted a "regulatory intent to allow [a] private right of action to enforce Bylaw 1101." (Pet. at 17.) Petitioners fabricate this "intent" by making the following argument. The NFA's Interpretative Notice to Rule 2-30—NFA's "Know Your Customer" rule—provides that the rule "does not create a private cause of action." (*Id.*) By Petitioners' convoluted logic, "one may, by process of elimination," therefore conclude that the NFA *wanted* plaintiffs to bring private court actions against its Members for violation of any rule or bylaw other than Rule 2-30. (*Id.*) This argument is preposterous.

The NFA never has intended, by its silence, to implicitly sanction a private right of action for violation of nearly all of its rules and bylaws. Such potential liability could bring the NFA to a standstill and prevent the promulgation of rules that are necessary to protect the interests of both the public and its Members. It also would place the NFA's administrative and enforcement priorities in the hands of the judiciary—an untenable result. *Cf. Heckler*, 470 U.S. at 831-32 ("An agency generally cannot act against each technical violation of the

statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.").

The reason that the NFA specifically addressed the private-right-of-action issue in its Interpretive Notice to Rule 2-30 was that some courts already had ruled that similar "Know Your Customer" rules in other states may be actionable. *See, e.g., Buttrey v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 410 F.2d 135, 141-42 (7th Cir. 1969). Because of such cases, the NFA felt the need to clarify its position. As noted above, however, no court ever has ruled that NFA 1101 or any similar bylaw may create an implied private right of action. That the NFA has not seen fit to expressly disavow such private causes of action in its Interpretive Notices should in no way be taken as a concession that such actions are condoned.[5]

C. This Court Should Not Entertain Petitioners' Request For A New Implied Private Right Of Action.

Since this Court's 1982 decision in *Curran*, where it upheld an implied private right of action under the anti-fraud provisions of the CEA, 456 U.S. at 388, "this Court has long since abandoned its hospitable attitude towards

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[5] Petitioners also argue that because NFA Bylaw 1101 is a "strict liability" offense, an implied private right of action should be recognized. (Pet. at 18.) Petitioners give no explanation, however, for why it should follow that an investor should have an implied right of action under a rule just because the NFA has set a high standard for compliance.

implied rights of action." *Thompson v. Thompson*, 484 U.S. 174, 190 (1988) (Scalia, J., concurring).[6] This is particularly true when Congress already has provided express remedies in the very same statute in which plaintiffs are trying to imply a remedy. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 175-77 (1994) (holding that the statutory text controls the conduct prohibited by SEC § 10(b) and that "Congress knew how to impose aiding and abetting liability when it chose to do so," but did not); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571-72 (1979) (finding no implied cause of action under SEC § 17(a), and reasoning in part that, "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").

Ironically, Congress' response to *Curran* was the passage of CEA § 22, which provides exclusive remedies for violations of the CEA in certain limited and specific circumstances. 7 U.S.C. § 25. Petitioners tried vigorously in the district court and the court of appeals to fit themselves within the express remedies provided by CEA § 22; ultimately, they did not succeed. In a final, desperate attempt to circumvent these exclusive remedies in the statute, Petitioners now argue that an implied right of

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[6] The only exception appears to be *Musick, Peeler & Garrett v. Employers Ins.*, 508 U.S. 286, 297-98 (1993), where the Court recognized an implied contribution action under SEC Rule 10b-5. The Court also has assumed that an implied private right of action continues to exist under Title IX of the Civil Rights Act, without actually revisiting the issue. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 65 (1992).

action should be added to this statutory scheme. But Congress' intent is clear: the implied rights that had existed prior to *Curran* have now been superseded by the express remedies afforded in CEA § 22. *See Am. Agric. Movement, Inc. v. Bd. of Trade*, 977 F.2d 1147, 1153 (7th Cir. 1992) ("By its terms, then, § 22(b) creates the exclusive remedies available to those injured by violations of the CEA . . . . The legislative history demonstrates that Congress intended to respond to *Curran* and resolve questions the Court left open.").

No matter how many times Petitioners reference the "public interest" in their petition, the only relevant question for determining whether an implied private right of action exists is a simple one: did Congress intend to imply such a remedy? *See Touche Ross*, 442 U.S. at 578 ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon the statutory scheme that Congress enacted into law."). Congress' passage of CEA § 22 mandates that that question be answered in the negative. Because that is exactly what the district court and court of appeals did in this case, there is no need for this Court to intervene.

The cases cited by Petitioners in support of finding an implied private right of action also are inapposite. (Pet. at 16.) Two of those cases actually held that no private right of action exists. *See Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182-83 (2d Cir. 1966) (no implied right of action for violation of NYSE and NASD rules); *Porter v. Shearson Lehman Bros., Inc.*, 802 F. Supp. 41, 61-63 (S.D. Tex. 1992) (no implied private right of action for violation of NASD "suitability" rule). The one case that did find that a private right of action may exist—the Seventh Circuit's decision in *Buttrey*, 410 F.2d at 141-

42—was decided in 1969 before this Court's and the Seventh Circuit's more recent jurisprudence restricting the right to bring an implied private cause of action. *See, e.g., Indemnified Capital Invs., S.A. v. R.J. O'Brien & Assocs., Inc.*, 12 F.3d 1406, 1412 (7th Cir. 1993) (no implied private right of action for violation of NFA Compliance Rule 2-4); *Spicer v. Chicago Bd. of Options Exch., Inc.*, 977 F.2d 255, 258-66 (7th Cir. 1992) (distinguishing *Buttrey* and refusing to find an implied private right of action against exchanges or market makers for violating or failing to enforce SEC trading rules).

The Court should therefore deny Petitioners' request to review whether an implied private right of action exists under the CEA for violations of NFA Bylaw 1101.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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Respectfully submitted,

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